

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Mass. Electric Construction Co.)	
)	C.A. No. 09C-01-138-JOH
Plaintiff)	
)	
v.)	
)	
Siemens Building Technologies, Inc., and)	
Gerling America Insurance Co.)	
)	
Defendants)	

Submitted: October 18, 2010

Decided: October 28, 2010

*Upon Application for a Certification of an Interlocutory Appeal by Defendant Gerling
America Insurance Co. – **CERTIFICATION REFUSED***

*Upon Motion of Defendant Gerling America Insurance Co. for
Entry of Final Judgment - **DENIED***

*Upon Motion of Defendant Gerling America Insurance Co. for
Stay Pending Appeal - **DENIED***

And now this 28th day of October, 2010, defendant Gerling America Insurance Co., has filed an application for certification of an interlocutory appeal, and for the entry of a final order and for stay of this Court’s opinion order of September 28, 2010. It further appears that:

1. Plaintiff Mass. Electric Construction Company (“Mass. Electric”) filed a declaratory judgment action seeking a determination that Gerling America Insurance Co.

(“Gerling”) and co-defendant Siemens Building Technologies, Inc. (“SBT”) owed it a duty to defend and indemnify it in a single personal injury action. That action is of the kind Gerling normally defends and does not involve issues of policy interpretation.

2. This Court determined under Pennsylvania law that Gerling was obligated to defend Mass. Electric (as was SBT) in that single personal injury action but that the indemnification issue was not ripe.

3. This Court’s holding was premised upon standard, accepted, and straightforward principles of contract law and did not involve any novel issues. The decision did not involve an interpretation of an insurance contract and its coverage.

4. Gerling disagrees with this Court’s ruling, claiming it established a substantial issue and determined a legal right. Inasmuch as this Court found Gerling owed a duty to defend Mass. Electric, Gerling is correct. But such a determination was no more than many other pre-trial rulings of this Court. There were no unsettled issues of law which this Court resolved nor are there conflicting court opinions.

5. Mass. Electric has been absorbing the costs of defense in the single personal injury action since 2008 and would continue to be prejudiced with further delayed resolution of the duty to defend issue. Gerling chose not to under its duty to defend with a reservation as it could have.

6. Mass. Electric opposes Gerling’s application for certification of an interlocutory appeal.

7. This Court concurs. Further, an interlocutory appeal on the issue of the duty to defend and resolution in Gerling’s favor would not terminate this litigation. The issue of indemnification remains.

8. To circumvent the possible inability for an interlocutory appeal, Gerling seeks to have several parts of this Court's opinion declared a final judgment under Superior Court Civil Rule 54(b). While the Rule permits such, this Court sees no reason to do so. Such an act would result in unnecessary and inefficient piecemeal litigation. Gerling has failed to demonstrate a compelling need for entry of a final judgment. Its posture in this case, fight the duty to defend rather than defend with reservation is a dilemma of its own choosing and should not have operate to prejudice Mass. Electric or the plaintiffs in the personal injury action.

9. Gerling has also sought a stay of this Court's order/opinion of September 28, 2010. To grant or deny a stay is discretionary.¹

10. In deciding whether this Court should grant a stay, it is to apply four tests: (1) make a preliminary assessment of likelihood of success on the merits of the appeal; (2) assess whether Gerling will suffer irreparable injury if this stay is not granted; (3) assess whether any other interested party will suffer substantial harm if the stay is granted, and (4) determine whether the public interest will be harmed if the stay is granted.² This Court is directed to balance all of threse equities in this case.³

11. As to these factors:

¹ *Homestore v. Tafeen*, 886 A.2d 502, 506 (2005).

² *Kirpat v. Delaware Alcoholic Beverage Control Comm.*, 741 A.2d 356, 357 citing *Evans v. Buchanan*, 435 F.Supp. 832 (D. Del. 1977).

³ *Kirpat* at 358.

a. This Court sees little likelihood success on the merits if an appeal is taken. The contract issues involved are not complex and lead to the result this Court reached.

b. Gerling has failed to show how it will be prejudiced if the stay is not granted; a most unusual request in a case of this nature. The personal injury case as a type which it routinely defends.

c. Any appeal at this point prejudices Mass. Electric: (1) in having to continue to pay attorneys fees to prosecute/defend this matter, (2) preventing Gerling from undertaking its normal contractual duties to defend, and (3) may prejudice the plaintiffs in the personal injury action if Gerling - chosen counsel has to get into the case when such counsel has not yet participated in any discovery; etc.; unnecessary delay will likely result.

d. The Court sees no or little “public interest” in this dispute. There are no overarching public interest issues and the dispute involves defense and possible indemnity in a single personal injury case.

e. Gerling has not presented a serious legal question that raises a “ ‘fair ground for litigation and thus more deliberative investigation.’ ”⁴

12. For the reasons stated herein, this Court:

- a. refuses to certify an interlocutory appeal;
- b. declines to enter a portion of its September 28, 2010 opinion/order as final judgment under Superior Court Rule 54(b); and

⁴ *Kirpat*, 741 A.2d at 358 citing *Washington Area Metro Transit Comm’n. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

c. declines to stay its decision pending an appeal.

IT IS SO ORDERED.

Judge